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<b>G.W., Appellant</b>	)	
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<b>and</b>	)	<b>Docket No. 17-0957</b>
	)	<b>Issued: June 19, 2017</b>
<b>DEPARTMENT OF VETERANS AFFAIRS,</b>	)	
<b>VETERANS ADMINISTRATION HEALTH</b>	)	
<b>ADMINISTRATION, Gainesville, FL, Employer</b>	)	
	)	

### Case Submitted on the Record

*Capp P. Taylor, Esq.*, for the appellant<sup>1</sup>  
*Office of Solicitor*, for the Director

Before:  
CHRISTOPHER J. GODFREY, Chief Judge  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
ALEC J. KOROMILAS, Alternate Judge

On July 18, 2014 appellant, through counsel, filed a timely appeal from February 28 and May 28, 2014 merit decisions of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## **ISSUE**

The issue is whether appellant has established permanent impairment of her bilateral lower extremities as a result of her December 17, 2009 employment injury.

## **FACTUAL HISTORY**

On December 29, 2009 appellant, then a 57-year-old nursing assistant, filed a traumatic injury claim (Form CA-1) alleging that on December 17, 2009 she sprained her lower back and left buttocks while transferring a patient. She stopped work and returned to limited duty on January 12, 2010.

OWCP accepted appellant's claim for sprain of the lumbar spine.<sup>3</sup>

Appellant's treating physician, Dr. John C. Charnas, Board-certified in occupational and preventive medicine, continued to provide work restrictions for appellant.

On October 26, 2010 OWCP referred appellant's claim to Dr. David Lotman, Board-certified in physical medicine and rehabilitation, for a second opinion examination to determine whether appellant continued to suffer residuals of her December 17, 2009 employment injury. In a November 18, 2010 report, Dr. Lotman accurately described the December 17, 2009 employment incident and reviewed the medical treatment that appellant had received. Upon examination of appellant's lumbar spine, he observed general midline tenderness from about L3 to the sacrum and tenderness of both sacroiliac (SI) joints and both sciatic notches. Straight leg raise testing was limited by low back pain. Dr. Lotman reported decreased sensation of the left foot in the L5 distribution and of the right foot in both L5 and S1 distributions. Motor weakness was also marked bilaterally. Dr. Lotman diagnosed degenerative disc disease of the lumbosacral spine, lumbosacral strain resolved, and symptom magnification. He opined that appellant's accepted lumbosacral sprain had resolved and that she had no work restrictions causally related to her December 17, 2009 employment injury.

OWCP thereafter determined that a conflict existed in the medical evidence as to whether appellant still had residuals of the accepted condition. Appellant was referred to Dr. Raul B. Zelaya, Board-certified in orthopedic surgery for an impartial medical evaluation. In reports dated July 14 and August 16, 2011, Dr. Zelaya related that a repeat magnetic resonance imaging (MRI) scan dated July 1, 2010 showed significant pathology that was not mentioned in the initial MRI scan report. Dr. Zelaya concluded that appellant's lumbosacral strain had not resolved and that appellant also had a chronic right sacroiliitis which was caused by the work-related event.

On October 4, 2011 OWCP expanded the acceptance of appellant's claim to include right sacroiliitis.

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<sup>3</sup> OWCP paid leave buy back compensation for medical treatment that appellant received from February 18 to November 16, 2010.

On December 14, 2012 appellant filed a claim for compensation (Form CA-7) requesting a schedule award. In an October 4, 2012 letter, Dr. George G. Feussner, a Board-certified psychiatrist and neurologist, reported that appellant had 20 percent permanent impairment. He explained that this rating was based upon Table 17-4, class 3, page 571, of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (hereinafter A.M.A., *Guides*) (6<sup>th</sup> ed. 2009), which related directly to the abnormalities found on appellant's MRI scan and electromyography (EMG) tests and her symptoms.

OWCP also received an additional undated report by Dr. Feussner. In this report, Dr. Feussner noted a date of injury of December 17, 2009 and related appellant's accepted conditions of lumbar sprain and right sacroiliitis. He indicated that at the time of injury appellant complained of right SI joint pain radiating to her right leg. Dr. Feussner noted that records were consistent with complaints of low back pain, radiating bilateral leg pain, and bilateral lower extremity weakness. He reported that a December 28, 2009 lumbar spine MRI scan report showed L4-5 broad-based disc bulge, bilateral foraminal narrowing, and broad-based disc bulge at L5-S1 with mild right and mild-to-moderate left foraminal narrowing. Dr. Feussner also indicated that a February 15, 2011 EMG and nerve conduction velocity (NCV) study of the bilateral lower extremities was consistent with bilateral L5 radiculopathy, right greater than left.<sup>4</sup>

By letter dated January 8, 2013, OWCP requested that appellant's treating physician provide a medical report with an opinion on whether she had reached maximum medical improvement (MMI) and whether she had a permanent impairment rating utilizing the A.M.A., *Guides*. Appellant was afforded 30 days to submit the additional evidence.

On January 18, 2013 Dr. James Dyer, a Board-certified orthopedic surgeon and OWCP medical adviser, reviewed the medical evidence of record and noted that appellant had reached MMI on November 16, 2010. He indicated that he disagreed with Dr. Feussner's impairment rating because it was improperly based on Table 17-4 of the A.M.A., *Guides* and failed to properly utilize the July/August 2009, *The Guides Newsletter* for spinal injuries. Dr. Dyer concluded that appellant had zero percent permanent impairment of appellant's right and left lower extremities.

In a letter dated January 24, 2013, Dr. Charnas related that he last treated appellant on November 28, 2011. He noted that appellant was presently under the care of Dr. Feussner. Dr. Charnas explained that since he was no longer appellant's treating physician he was unable to determine an impairment rating and would defer to Dr. Feussner.

OWCP received examination notes dated January 29 and February 18, 2013 from Dr. Feussner who related that appellant continued to have some difficulty with her back and had symptoms of radiculopathy. Dr. Feussner recommended that appellant continue with physical therapy. He provided results from an EMG/NCV study of appellant's bilateral lower extremities dated February 15, 2011.

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<sup>4</sup> The report had a section entitled "Evaluation of Impairment," which was crossed out and included a handwritten notation to "see attached."

By letter dated February 12, 2013, OWCP advised Dr. Feussner that FECA did not provide for schedule awards for permanent impairment for the spine, but awards could be paid for permanent impairment of the upper or lower extremities caused by injury to a spinal nerve. It requested that Dr. Feussner provide an impairment rating of the affected extremities according to the July/August 2009 *The Guides Newsletter*.

In a February 22, 2013 letter, Dr. Feussner noted that appellant had reached MMI. He related that most of the information that OWCP had requested was already contained within his records, including objective findings, subjective complaints, and diagnosis. Dr. Feussner reported that appellant had 20 percent permanent impairment based upon the A.M.A., *Guides*, sixth edition, Table 17-4, class 3, page 571. He explained that the diagnoses were confirmed by abnormalities found on MRI scan and EMG tests. Dr. Feussner noted that appellant would be on permanent restrictions for her back.

Appellant also provided several reports from Dr. Feussner, which were previously of record, including a February 15, 2011 initial evaluation report. Dr. Feussner related that appellant complained of lumbar pain radiating down both legs, right greater than left, numbness and tingling of her right calf, anterior foot, left buttock, and thigh, and spasms of the right thigh. He reviewed appellant's history and conducted an examination. Dr. Feussner reported focal tenderness and stiffness due to spasm and a mild degree of limitation of range of motion of appellant's lumbar spine. Straight leg raise testing was severely positive bilaterally. He indicated that an EMG/NCV study performed that day was consistent with bilateral L5 radiculopathy, right greater than left. Dr. Feussner diagnosed severe lumbar radiculopathy secondary to lumbar degenerative joint and disc disease. He provided the February 15, 2011 EMG/NCV study of the bilateral lower extremities.

OWCP received examination notes dated February 22, 2011 to February 18, 2013 by Dr. Feussner who summarized the medical treatment appellant received for her continued complaints of her back and bilateral lower extremities. Dr. Feussner provided examination findings and indicated that appellant would have permanent restrictions for her back. He also provided epidural injection reports. Dr. Feussner opined in an October 4, 2012 letter that appellant had 20 percent permanent impairment.

In a March 13, 2013 report, Dr. H.P. Hogshead, a Board-certified orthopedic surgeon and an OWCP medical adviser, reviewed the medical evidence of record, including Dr. Dyer's January 18, 2013 report and Dr. Feussner's February 22, 2013 letter. He noted his disagreement with Dr. Feussner's impairment rating because it was based on Table 17-5 of the A.M.A., *Guides* and OWCP did not recognize impairment of the spine nor whole person. Dr. Hogshead opined that based on the record appellant had no impairment rating of the bilateral lower extremities.

OWCP denied appellant's schedule award claim in a decision dated March 19, 2013. It found that the medical evidence of record failed to establish ratable permanent impairment of a scheduled member or function of the body causally related to the December 17, 2009 employment injury.

On April 10, 2013 appellant requested a telephone hearing before an OWCP hearing representative, which was held on August 13, 2013. Counsel participated. He alleged that

instead of sending appellant's schedule award claim to an OWCP medical adviser, OWCP should have sent appellant's schedule award claim to a second opinion examiner who was well versed in applying the guidelines for rating an impairment to appellant's lumbar spine, particularly the July/August 2009, *The Guides Newsletter*. Counsel noted that OWCP's medical adviser should have done the same instead of only concluding that Dr. Feussner did not properly utilize the A.M.A., *Guides*. He contended that appellant had 39 percent permanent impairment of the right lower extremity and 29 percent permanent impairment of the left lower extremity.

By decision dated December 5, 2013, an OWCP hearing representative affirmed OWCP's March 19, 2013 schedule award decision. He found that the medical evidence of record failed to establish ratable permanent impairment of a scheduled member or function of the body causally related to the December 17, 2009 employment injury.

In letters dated December 14 and 17, 2013, counsel indicated that he was submitting an impairment rating utilizing the July/August 2009 *The Guides Newsletter*. OWCP received a December 9, 2013 report by Dr. Feussner who related that at the time of injury appellant complained of right SI joint pain radiating down the right leg. Dr. Feussner noted that a December 28, 2009 lumbar spine MRI scan showed L4-5 broad-based disc bulge, bilateral foraminal narrowing, and broad-based disc bulge at L5-S1 with mild right and mild-to-moderate left foraminal narrowing. He further related that a February 15, 2011 EMG/NCV study of the bilateral lower extremities was consistent with bilateral L5 radiculopathy. Dr. Feussner opined that according to Table 2 for spinal nerve impairment lower extremity, appellant has a default class 1 impairment for L5 radiculopathy. He noted that a moderate rating was 13 percent and mild sensory was 1 percent for a total of 14 percent lower extremity permanent impairment on the right and 14 percent lower extremity permanent impairment on the left. Dr. Feussner reported that findings were based on the July/August 2009 *The Guides Newsletter*.

On December 16, 2013 Dr. Hogshead, an OWCP medical adviser, again reviewed the medical evidence of record, including Dr. Feussner's December 9, 2013 report. He noted that Dr. Feussner's impairment rating relied on a February 15, 2011 electrodiagnostic study, but the record provided by OWCP only contained the electrodiagnostic study without any analysis or interpretation. Dr. Hogshead related that although Dr. Feussner noted bilateral L5 motor and sensory radiculopathy of the bilateral lower extremities, Dr. Lotman, an OWCP second opinion examiner, had found in his November 18, 2010 report that appellant had no evidence of radiculopathy. He concluded that appellant had no permanent impairment of the bilateral lower extremities causally related to the December 17, 2009 employment injury.

On January 7, 2014 appellant, through counsel, requested reconsideration. He indicated that he was enclosing a December 9, 2013 report from Dr. Feussner, which was new evidence that was not previously considered. Appellant submitted Dr. Feussner's December 9, 2013 report. He also resubmitted the February 15, 2011 EMG/NCV study and initial evaluation report by Dr. Feussner.

In a decision dated February 28, 2014, OWCP denied modification of the December 5, 2013 decision. It found that the medical evidence of record failed to establish ratable permanent impairment of a scheduled member or function of the body causally related to the December 17, 2009 employment injury.

On April 28, 2014 appellant, through counsel, requested reconsideration. He alleged that Dr. Feussner's December 9, 2013 report clearly comported with the July/August 2009 *The Guides Newsletter*. Counsel also noted that the February 15, 2011 EMG/NCV study should be in appellant's case file. He asserted that the December 16, 2013 report of OWCP's medical adviser was extremely tainted as he indicated that he did not review the February 15, 2011 EMG/NCV study. Counsel contended that OWCP committed extreme error in not providing OWCP's medical adviser with the February 15, 2011 EMG/NCV study. He resubmitted Dr. Feussner's December 9, 2013 impairment rating report, Dr. Feussner's February 15, 2011 EMG/NCV study, and Dr. Feussner's February 15, 2011 initial evaluation report.

By decision dated May 28, 2014, OWCP denied modification of the February 28, 2014 decision. It found that the medical evidence of record continued to lack probative evidence to establish that appellant sustained a partial permanent impairment of a scheduled member covered under FECA. OWCP also considered counsel's new legal arguments and determined that the arguments were insufficient to establish appellant's schedule award claim.

### **LEGAL PRECEDENT**

The schedule award provision of FECA<sup>5</sup> and its implementing regulations set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members or functions of the body. FECA, however, does not specify the manner in which the percentage of loss of a member shall be determined. The method used in making such determination is a matter which rests in the sound discretion of OWCP. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by OWCP as a standard for evaluation of schedule losses and the Board has concurred in such adoption.<sup>6</sup> For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition of the A.M.A., *Guides*, published in 2009.<sup>7</sup>

A schedule award can be paid only for a condition related to an employment injury. The claimant has the burden of proving that the condition for which a schedule award is sought is causally related to her employment.<sup>8</sup>

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<sup>5</sup> *Supra* note 2.

<sup>6</sup> 20 C.F.R. § 10.404 (1999); *see also* Jacqueline S. Harris, 54 ECAB 139 (2002).

<sup>7</sup> *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (February 2013).

<sup>8</sup> *See* Veronica Williams, 56 ECAB 367 (2005).

Neither FECA nor its regulations provide for a schedule award for impairment to the back or to the body as a whole.<sup>9</sup> Furthermore, the back is specifically excluded from the definition of organ under FECA.<sup>10</sup> The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as impairments of the extremities. Recognizing that FECA allows ratings for extremities and precludes ratings for the spine, the July/August 2009, *The Guides Newsletter* offers an approach to rating spinal nerve impairments consistent with sixth edition methodology. For peripheral nerve impairments to the upper or lower extremities resulting from spinal injuries, OWCP procedures indicate that *The Guides Newsletter* is to be applied.<sup>11</sup>

Section 8123(a) of FECA provides that if there is a disagreement between the physician making the examination for the United States and the physician of an employee, the Secretary shall appoint a third physician (known as a referee physician or impartial medical specialist) who shall make an examination.<sup>12</sup> This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.<sup>13</sup>

### ANALYSIS

OWCP accepted that appellant sustained lumbar sprain and right side sacroiliitis as a result of a December 17, 2009 employment injury. On December 14, 2012 appellant filed a claim for a schedule award. She submitted various reports by Dr. Feussner who opined in a December 9, 2013 report that appellant had 14 percent permanent impairment of each lower extremity according to the A.M.A., *Guides*, July/August 2009 *The Guides Newsletter*. Dr. Hogshead, an OWCP medical adviser, disagreed with Dr. Feussner's impairment rating and opined that appellant had no ratable impairment of her bilateral lower extremities causally related to the December 17, 2009 employment injury. Based on Dr. Hogshead's December 16, 2013 report, OWCP denied appellant's schedule award claim.

The Board finds that this case is not in posture for decision as there is an unresolved conflict in medical opinion regarding whether appellant has sustained a permanent impairment for purposes of a schedule award.

In his December 9, 2013 impairment rating report, Dr. Feussner related that a February 15, 2011 EMG/NCV study of appellant's bilateral lower extremities was consistent with bilateral L5 radiculopathy. He opined that based on the July/August 2009 *The Guides Newsletter*, Table 2, for spinal nerve impairment of the lower extremity, appellant had a default

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<sup>9</sup> See *N.D.*, 59 ECAB 344 (2008); *Tania R. Keka*, 55 ECAB 354 (2004).

<sup>10</sup> See 5 U.S.C. § 8101(19); *Francesco C. Veneziani*, 48 ECAB 572 (1997).

<sup>11</sup> *Supra* note 6 at Chapter 3.700 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

<sup>12</sup> 5 U.S.C. § 8123(a); see *R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009).

<sup>13</sup> 20 C.F.R. § 10.321.

class 1 impairment for L5 radiculopathy. Dr. Feussner noted that a moderate rating was 13 percent and mild sensory rating was 1 percent for a total impairment of 14 percent lower extremity impairment on the right and 14 percent lower extremity impairment on the left.

OWCP referred Dr. Feussner's December 9, 2013 report to Dr. Hogshead, an OWCP medical adviser, who disagreed with Dr. Feussner's impairment rating. Dr. Hogshead explained that although Dr. Feussner observed bilateral L5 radiculopathy of the lower extremities, Dr. Lotman, an OWCP second opinion examiner, had found no evidence of radiculopathy in his November 18, 2010 report. Accordingly, Dr. Hogshead concluded that appellant had no permanent impairment of the bilateral lower extremities.

The Board finds that there remains an unresolved conflict in the medical evidence between Dr. Feussner, appellant's treating physician, and Dr. Hogshead, OWCP's medical adviser, regarding whether appellant has established permanent impairment of her bilateral lower extremities as a result of her December 17, 2009 employment injury. In a December 9, 2013 report, Dr. Feussner opined that appellant had 14 percent permanent impairment of her bilateral lower extremities. OWCP's medical adviser, Dr. Hogshead, however, determined that appellant did not have any ratable impairment of her bilateral lower extremities.

As noted above, if there is disagreement between an employee's physician and OWCP's referral physician, OWCP will appoint a referee physician or impartial medical specialist who shall make an examination.<sup>14</sup> As there is an unresolved conflict in the medical evidence regarding whether appellant has established permanent impairment of her bilateral lower extremities as a result of her December 17, 2009 employment injury, the case must be remanded to OWCP for referral to an impartial medical specialist for resolution of the conflict in the medical opinion evidence in accordance with 5 U.S.C. § 8123(a). After such further development as OWCP deems necessary, it shall issue a *de novo* decision.

### **CONCLUSION**

The Board finds that the case is not in posture for decision.

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<sup>14</sup> *Supra* note 12.



**ORDER**

**IT IS HEREBY ORDERED THAT** the May 28 and February 28, 2014 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: June 19, 2017  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board